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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-6146

KENNETH SUEL,

Petitioner,

v.

JACK ADDINGTON, LOUIS KING, DON SHOEMAKER, and STUART E. TOPE, a/k/a STEWART TOPE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION NOT PR

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8) is reported at 465 F.2d 889.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1972 (Pet. App. 8). A timely petition for rehearing was denied on November 6, 1972 (Pet. App. 9).

The petition for certiorari was filed on February 2, 1973. The jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an adverse judgment rendered by the district court against the petitioner who claimed a Civil Rights Act violation denied the petitioner the use of the court resulting in a taking of property without due process of law or a violation of the civil rights of the petitioner.

2. Whether the assessment of $100.00 nominal costs against the petitioner's counsel for vexatiously multiplying the proceedings under 28 U.S.C. §1927 without a hearing denied the petitioner's counsel equal protection of the laws or due process.

STATEMENT

This is an action for damages under the Civil Rights Act, 42 U.S.C. §§1983 and 1985, against employees of the State of Alaska.

Suel was employed as an auto mechanic by the Division of Aviation for the State of Alaska at the airport located at King Salmon, Alaska. King (a respondent) was the State supervisor at the airport. Addington (a respondent) was an employee of the State of Alaska at said airport. Don Shoemaker (a respondent) was the Chief Mechanic for the Division of Aviation and was based in Anchorage, Alaska. Mr. Tope (a respondent) was the Director of all bush airports including King Salmon and was based in Anchorage, Alaska.

Suel claimed that the respondent employees conspired to discriminate against him on the basis of his race. No evidence was presented at the trial which indicated a conspiracy by anyone to discriminate against Mr. Suel.

Suel is mistaken when he alleges there was undisputed evidence that Sheomaker made the statement, "I would not work with a nigger" (Pet. 3). Suel testified King told him that Shoemaker made this statement. King denied this and doubted that Shoemaker made the statement. At the trial Suel failed to ask Shoemaker whether he made the statement.

The petitioner is also mistaken in alleging there is undisputed evidence that Addington made a statement that he would like to shoot Martin Luther King, President Johnson and Alaskan Governor Egan (Pet. 3). Suel testified that these statements were made to him by Addington. Addington denied making these statements.

With respect to the alleged complaint letters about Suel (Pet. 3), none of these letters were proven to be written in concert. King made periodic reports to his superiors on the employment conditions at King Salmon. Shoemaker, as one of his duties, traveled to each bush airport and inspected machinery. His report of the machinery at King Salmon which Suel was responsible for indicated the machinery was not in proper repair and Suel was not doing a proper job. Suel himself wrote several complaint letters to the Division of Aviation headquarters in Anchorage, Alaska.

Although there were other employees at the airport who worked with Suel and the respondents, Suel was the only person testifying on his behalf about the alleged conspiracy to discriminate. Suel's testimony was self-serving and was severely impeached by the testimony of two other employees who worked with Suel at King Salmon. Suel sent a five page complaint letter to the Division of Aviation in Anchorage complaining about King, Addington and Shoemaker. This letter contained the signatures of Ely Ring and Paul Johnson, both

co-employees with Suel. Each of these people testified that this letter had been altered after they had signed it by adding the first three pages, rewriting the fourth page and adding the last paragraph on page five. The added portions of the letter contained the complaints against King, Addington and Shoemaker. Suel was also severely impeached by evidence that he carried a gun to work after his supervisor had dismissed him from employment.

Mr. Bowman, a Negro, and former Executive Director of the Alaska State Human Rights Commission, after receiving complaints from Suel, went to King Salmon to investigate the matter. Bowman's final report stated there was no racial discrimination against Mr. Suel. Bowman also stated at the trial that Suel told him there was no racial discrimination against him and that he wished to drop the charges. Suel also told this to Mr. Clark who accompanied Bowman on the investigation. Suel also told Bowman after Suel had been dismissed from his position at King Salmon that he did not want his job back and that the problems at King Salmon were the result of further breakdown of supervision by the supervisor. Mr. Bowman's and Mr. Clark's testimony was given full credence by the trial court. (Pet. 3; App. ii)

Suel has presented no facts to this Court and there are no facts which indicate that the trial judge denied Suel the access to the courts. Trial of this matter commenced on March 23, 1971 and continued for several days. The trial court held open the evidence in this case for a period of seventeen days because Suel said he had another witness to present.

In May, 1971, the district court dismissed Suel's complaint with prejudice and awarded a nominal cost of $100.00 against Suel's counsel for having so vexatiously and unreasonably multiplying the proceedings as to

increase costs pursuant to 28 U.S.C. §1927. (Pet. App. 7; App. iii) The court of appeals affirmed the district court's judgment. (Pet. App. 8)

ARGUMENT

The decision is correct, does not conflict with any decision of this Court or any other court, and presents no question warranting further review.

1. The petitioner's second question in the petition for certiorari (Pet. 2) is unclear and unintelligible. Petitioner's brief on this question is also unclear. For these reasons the Court should deny the petition on the second question pursuant to Rule 23(3) of the Supreme Court Rules.

In the event the petitioner is claiming that he was denied the use of the district court, he has presented no evidence or argument to show such denial. If the petitioner was denied the use of the district court he has failed to follow the proper procedures to force that court to permit him to use the court. The petitioner has failed to proceed under Rule 21(a) of the Federal Rules of Appellate Procedure. This rule provides for obtaining a writ of mandamus from the court of appeals to direct a judge of the district court to proceed or do other acts within his jurisdiction. The petitioner has not sought such a writ from any court of appeal in this case.

Additionally, the evidence in this matter shows the district court gave every opportunity to the petitioner to prove his case.

There is a remote possibility that the petitioner's second question in the petition for certiorari is claiming the district court abused its discretion in finding there was no conspiracy to racially discriminate against the petitioner. This, however, is probably not what the

petitioner is attempting to have this Court review because the petitioner failed to have the record certified and transmitted from the court of appeals to this Court pursuant to Rule 21(1) of the Supreme Court Rules.

There is no fact in this case to support the petitioner's claim that there was a conspiracy to discriminate against him on the basis of his race. The petitioner himself did not testify that there was a conspiracy on anyone's behalf to discriminate against him. The only evidence of any discrimination was provided by the petitioner and refuted by the respondents, Mr. Bowman, Mr. Clark and other witnesses.

2. The district court neither abused its discretion nor improperly applied the law when it assessed nominal costs against the petitioner's counsel pursuant to 28 U.S.C. §1927. This Court should not review the first question set forth in the petition for certiorari. The petitioner's counsel is relying on the 14th Amendment to the United States Constitution in its argument that notice and hearing was necessary before a federal judge could assess nominal costs under 28 U.S.C. §1927. One of the most basic elements of constitutional law is that the due process clause of the 14th Amendment does not apply to the actions of a federal judge. The 14th Amendment is applicable only to state action. The assessment of the nominal costs in this case by a federal judge is certainly not state action. The petitioner's counsel argued the same 14th Amendment argument in the court of appeals. This failure to rely upon and argue the proper constitutional provision by petitioner's counsel is enough in itself for this Court to not consider the first question on the petition for certiorari.

The court of appeals has not rendered a decision which conflicts with a decision of another court of appeals on

the same matter. The petitioner's counsel claims that the court of appeals decision conflicts with *Miles v. Dickson*, 387 F.2d 716 (5th Cir. 1967); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968), *cert. den.* 395 U.S. 908 (1969); *Weiss v. United States*, 227 F.2d 72 (2d Cir. 1955), *cert. den.* 350 U.S. 936 (1956); and *Gamble v. Pope and Talbot, Inc.*, 307 F.2d 729 (3d Cir. 1962), *cert. den.* 371 U.S. 888 (1962) [Pet. 5].

The decision of the 9th circuit court of appeals does not conflict with the decision of the 5th circuit court of appeals in the *Miles, supra*, case. In *Miles* the court of appeals held that the trial court's assessment of costs against an attorney pursuant to 28 U.S.C. §1927 was not supported by the facts and circumstances in the case. The court suggested in dictum that to assess the costs against the attorney without notice and hearing was wrong. The court specifically stated, however, that it was not basing its ruling on that procedural ground. The court in *Hanley v. Condery*, 467 F.2d 697 (2d Cir. 1972) also recognizes that the dictum in the *Miles* case was merely a suggestion. Thus there is no decision in any court of appeals which require that a notice and hearing be given to an attorney who is being assessed costs by the court under 28 U.S.C. §1927.

The cases in the other circuit courts of appeal which petitioner's counsel claims to conflict with the 9th circuit decision in this case are all cases dealing with the discretion of the district court in determining what conduct warrants the assessment of costs under 28 U.S.C. §1927. There is no conflict between these cases and the 9th circuit court of appeals decision.

Additionally, the findings that the petitioner's claims were frivolous and the petitioner's counsel vexatiously and unreasonably delayed the proceedings were factual determinations made by the district court. The court of

appeals found that the district court did not abuse its discretion in making these findings (Pet. App. 8). Thus, as to these findings, this Court should apply the "two court" rule. *Berenyi v. Immigration Service*, 385 U.S. 630 (1967). The exceptions to this rule are not present here. There is not a very obvious and exceptional error in the district court findings and there is not a constitutional claim which depends upon a resolution of the facts.

The petitioner's counsel can hardly claim that he did not have notice of the possibility of assessing costs under 28 U.S.C. §1927. An attorney admitted to practice before the district court is an officer of that court. *Theard v. United States*, 354 U.S. 278 (1957). An an officer of that court he is certainly presumed to know each of the laws that could affect him personally. If he were not held to a status of having continuous knowledge of the rules and laws affecting procedures in the district court a chaotic condition would soon result.

The assessment of costs under 28 U.S.C. §1927 is not a penalty but is a payment to a party litigant whose costs were increased by virtue of the attorney's conduct. *Gamble v. Pope and Talbot, Inc.*, 307 F.2d 729 (3d Cir. 1962), *cert. den.* 371 U.S. 888 (1962). The costs assessed under 28 U.S.C. §1927 must be based on actual costs which are allowed by the statutes and court rules governing cost items. In re *Realty Associates Securities Corporation*, 53 F. Supp. 1013 (E.D. N.Y. 1943). The costs assessed against the attorney in the present matter were assessed as an intricate part of a proceeding before the district court. At a trial there are several things before a court other than the merits of the trial, such as the assessment of costs in favor of the prevailing party and the person who will be liable for those costs. An additional hearing on the nominal costs assessed in this case would be fruitless because it would be held before

the same judge reviewing the same factual situation that led him to his conclusion that the case was frivolous and that the attorney had vexatiously and unreasonably caused additional costs. This result could have been accomplished by a motion for reconsideration of the district court's cost findings.

If an additional hearing is required before assessing costs against an attorney pursuant to 28 U.S.C. §1927 such a hearing will place the attorney and his client in untenable positions. The client's bill for costs is obviously lessened by the amount the attorney must pay pursuant to 28 U.S.C. §1927. Thus, at the hearing the client would be adversely arguing against his attorney. The opposing party would normally not be concerned with who paid the costs which were assessed against the attorney. As a practical matter, 28 U.S.C. §1927 protects a losing client from having to pay costs which were unreasonably and vexatiously caused by his attorney. Cf. *Toledo Metal Wheel Co. v. Foyer Bros. and Co.*, 223 F.2d 350 (6th Cir. 1915).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOHN E. HAVELOCK
Attorney General
B. RICHARD EDWARDS
Assistant Attorney General
Attorney for Respondents,
State of Alaska

March 1973

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

KENNETH SUEL,)
Plaintiff,)
v.)
JACK ADDINGTON, *et al.,*)
Defendants.)

No. A-52-68 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having been tried by the court without a jury and the court having duly considered the evidence, the arguments of counsel and being fully advised in the premises, makes and enters the following:

FINDINGS OF FACT

1. Plaintiff is a citizen of the United States of America and the State of Alaska. At all times material hereto, defendants were employees of the State of Alaska. Plaintiff was a probationary employee of the State of Alaska. Plaintiff is a member of the Negro Race. Defendants are members of the Caucasian Race.

2. Plaintiff's employment with the State of Alaska commenced on or about August 2, 1966 and plaintiff was discharged from State employment on January 24, 1967.

3. Defendants did not conspire against plaintiff to deprive him of his employment with the State of Alaska because of his race or national origin.

4. Defendant King did not threaten to transfer plaintiff for the alleged reason that other employees did not want to work with plaintiff because he was a member of the Negro Race.

5. Defendant Stuart E. Tope did not reprimand plaintiff for writing a letter of complaint about defendant King and did not threaten plaintiff that he would be fired if plaintiff wrote any more letters of complaint.

6. Defendant Stuart E. Tope died on June 24, 1968. This fact was noted or suggested upon the records of the court in an order filed July 15, 1968. No motion was thereafter filed for the substitution of a proper party.

7. After considering and weighing all the testimony and evidence in the case under the tests and standards applied by courts and juries, the court finds that the testimony given by the witnesses Willard Bowman and Glenn M. Clarke is entitled to full credence.

8. Plaintiff has failed to prove by a preponderance of the evidence that his discharge was due to racial discrimination.

9. Plaintiff has failed to prove by a preponderance of the evidence that he is entitled to relief under the Civil Rights Act or under any provision of the Constitution or laws of the United States.

10. Plaintiff's alleged claims are frivolous. Plaintiff's counsel has so multiplied the proceedings in this case as to increase costs unreasonably and vexatiously.

11. The Court finds that the claims asserted by plaintiff in this action have not been proved by a preponderance of the evidence and that plaintiff is not entitled to recover thereon.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this action under 28 U.S.C.A. §1343 and 42 U.S.C.A. §1985.

2. The action is hereby dismissed as to the defendant Stuart E. Tope pursuant to Rule 25(a), Federal Rules of Civil Procedure.

3. Plaintiff has failed to prove by a preponderance of the evidence that he is entitled to any relief.

4. Defendants are entitled to a judgment dismissing this action with prejudice.

5. Defendants are entitled to costs as provided by 28 U.S.C.A. §1927. However, the Court in its discretion will award only nominal costs in the sum of $100.00.

/s/ Raymond E. Plummer
United States District Judge

DATED: May 18, 1971
Copies mailed to:
M. Ashley Dickerson
B. Richard Edwards, Esq.,
Ass't State Attorney General

UNITED STATES SUPREME COURT RULES

Supreme Court Rule 19

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither control-

ling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

Supreme Court Rule 21(1)

A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request

that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

Supreme Court Rule 23(3)

All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

FEDERAL RULES OF APPELLATE PROCEDURE

Federal Rule 21(a)

Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing. Application for a writ of a mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

UNITED STATES CODE

28 U.S.C. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplied the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the

purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.